



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT OFFICE  
Washington, DC 20570

Via email

November 21, 2017

David A. Rosenfeld  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway  
Suite 200  
Alameda, CA 94501

Re: FOIA Case No. NLRB-2017-001952

Dear Mr. Rosenfeld:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, dated and received in this Office on August 3, 2017, in which you seek copies of all statements and affidavits that a specified individual has provided in the following 14 cases: NLRB Case Nos. 21-CB-015092, 21-CB-015140, 21-CB-079284, 21-CB-090277, 21-CB-109488, 21-CB-135272, 21-CB-141958, 21-CB-149154, 21-CB-155944, 21-CB-156258, 21-CB-156751, 21-CB-165066, 21-CB-167153, and 21-CB-190078. You agreed to assume financial responsibility for the processing of this request.

We acknowledged your request on August 3, 2017. We regret the delay in this final response.

Regarding your specific request for copies of affidavits and witnesses statements provided by a specified individual, the Agency neither admits nor denies whether there are any such affidavits or witness statements contained in the files for the above-referenced cases, because such confirmation or denial would harm the privacy interests protected by the FOIA. *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 67-69 (2d Cir. 2009); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C.Cir.1982). Furthermore, to the extent such documents exist, your request is denied, as they would be exempt from disclosure in full pursuant to FOIA Exemptions 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D)), as explained below.

Fully mindful that as a general matter, the FOIA's overarching objective is disclosure, it is well established that sworn affidavits are records warranting privacy protection under Exemptions 6 and 7(C). One's status, for example, as a government informant or potential witness is a protectable privacy interest under Exemptions 6 and 7(C). *See*,

e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *White v. IRS*, 707 F.2d 897, 901-02 (6th Cir. 1983) (withholding names of persons who indicated willingness to further government's investigation by providing information about appellant); *Johnson v. Comm'r of Internal Revenue*, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) (allowing categorical withholding of any identifying information about third parties and witnesses, as well as any information that they provided to federal agency) (Exemption 7(C)), aff'd on other grounds, 68 F.App'x 839 (9th Cir. 2003); *Lamont v. U.S. Dep't of Justice*, 475 F. Supp. 761, 781-82 (S.D.N.Y. 1979) (applying Exemption 6 to protect names of government employees, informants, confidential sources and third parties mentioned in government files).

Moreover, the application of FOIA Exemptions 6 and 7(C) requires a balancing of the public and personal privacy interests involved. "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *American Immigration Lawyers Ass'n*, 830 F.3d 667, 674 (D.C. Cir), citing *Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994) (internal quotation marks omitted). Here, your asserted interest in obtaining the requested documents to assist in a civil lawsuit is not a recognizable public interest that would enhance the understanding of operations or activities of the Agency. See *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery"); see also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242 n.23; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). Accordingly, in the absence of any countervailing public interest, the individual's right to privacy prevails and supports the protection of any affidavits or witness statements which may have been taken in connection with the requested unfair labor practice cases.

Apart from Exemptions 6 and 7(C), explained above, FOIA Exemption 7(D) also assures that confidential sources are protected from harassment and retaliation in order to prevent the loss of valuable sources of information. See *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94-95 (2d Cir. 1985) ("Employees are the principal, and in many cases the sole, source of the Board's information in unfair labor practice cases. . . . The Board's ability to grant adequate assurances of confidentiality is therefore essential to its ability to receive information."). To that end, Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

Further, as noted by the Supreme Court in *DOJ v. Landano*, 508 U.S. 165, 174 (1993), a source should be deemed confidential if the source furnished information with the understanding that the agency "would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes." The identity of a source is

protected within the meaning of Exemption 7(D) whenever an agency can show that the source either “provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred.” *Landano*, 508 U.S. at 172. Significantly, the identity of a source can be withheld under Exemption 7(D) even if his or her identity becomes known through other means. See, e.g., *Jones v. F.B.I.*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (exemption 7(D) protection is available even if the source has testified in court or the information provided by the source has otherwise been made public); *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d at 960 (finding identity protected even though the identity of the source and his attorney were known after the source talked to a U.S. Attorney; no evidence of waiver by source); *Lesar, v. United States, Dep’t of Justice*, 636 F.2d 472, 492 (D.C. Cir. 1980).

In general, when witness statements are secured by the Agency as part of the Region’s investigation of a case, witnesses are given express and/or written assurances of confidentiality when they give their statements. Even with the redaction of names and personal identifiers from these statements, a requester could still try to use other information contained within the statement to discern the identity of the affiant, thereby destroying the confidentiality protected by Exemption 7(D). Therefore, in order to protect the Agency’s confidential sources, statements given to Board agents are exempt in full from disclosure.

For all of these reasons, to the extent that any affidavits or witness statements exist or were obtained during the course of the Agency’s investigation in the requested cases, your request is denied.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. Section 102.117(d)(2)(ii)(A). Charges for all categories of requesters are \$3.10 per quarter-hour or portion thereof of clerical time and \$9.25 per quarter-hour or portion thereof of professional time. 29 C.F. R. § 102.117(d)(2)(i).

One-quarter hour of professional time was spent on processing your request. Accordingly, please remit \$9.25.

To pay this amount by check or money order (do not send cash), please submit your payment along with the invoice to the NLRB’s Finance Branch at the address reflected at the top of the invoice. Please make the check or money order payable to the National Labor Relations Board and note on your payment the invoice number to insure that your

David A. Rosenfeld  
November 21, 2017  
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payment will be properly credited. You may also submit your payment by credit or debit card over [www.pay.gov](http://www.pay.gov).

You may contact FOIA Attorney Marissa Wagner, who processed your request, at (202) 273-2957 or by email at [marissa.wagner@nrlb.gov](mailto:marissa.wagner@nrlb.gov), as well as our FOIA Public Liaison at (202) 273-0902 or by email at [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov), for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland, 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov), telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.regulations.gov/foia/action/public/home>, by mail at: National Labor Relations Board, Division of Legal Counsel, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to [DLCFOIAAppeal@nrlb.gov](mailto:DLCFOIAAppeal@nrlb.gov), within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based. Should you have questions concerning this letter, you may contact Denise Meiners, FOIA Supervisor, at (202) 273-2935 or by email at [Denise.Meiners@nrlb.gov](mailto:Denise.Meiners@nrlb.gov).

Sincerely,

*Synta E. Keeling /s/*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

May 17, 2018

David Rosenfeld  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501

Re: FOIA Case No. NLRB-2017-001954

Dear Mr. Rosenfeld:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on August 3, 2017, in which you request copies of all statements and affidavits filed by a specifically named individual in 14 cases involving Iron Workers Local 229. You agreed to assume financial responsibility for the processing of your request in the amount of \$30.00.

We acknowledged your request on August 3, 2017. We regret the delay in our final response.

To the extent your request seeks affidavits by a specifically named individual, after a search and review of the requested case files, we neither admit nor deny the existence of such records, as any such confirmation or denial would harm the privacy and identity source protections afforded by FOIA Exemptions 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(6), 7(C) and 7(D)). *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 67-69 (2d Cir. 2009); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C.Cir.1982). Moreover, to the extent that affidavit records exist, your request is denied, as they would be exempt from disclosure in full pursuant to FOIA Exemptions 6, 7(C), and 7(D).

Affidavits taken by the Regional Office during the investigation of a case are records warranting privacy protection, pursuant to FOIA Exemption 6, which protects information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C). An individual's status as a union

supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). *See, e.g., Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source..." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v).

David Rosenfeld

May 17, 2018

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Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Processing of this request required no review time. Accordingly, there is no charge for this request.

You may contact Michael A. Maddox, the FOIA Attorney-Advisor who processed your request, at 202-273-0013 or by email at Michael.Maddox@nrlb.gov, as well as our FOIA Public Liaison at (202) 273-0902 or by email at FOIAPublicLiaison@nrlb.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov, telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal with the Division of Legal Counsel (DLC) through FOIAonline at:

<https://foiaonline.regulations.gov/foia/action/public/home>, by mail at: National Labor Relations Board, Division of Legal Counsel, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to DLCFOIAAppeal@nrlb.gov, within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,

*Synta E. Keeling /s/*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 31, 2017

(b) (6), (b) (7)(C)

Re: FOIA Case No. NLRB-2017-001977

Dear (b) (6), (b) (7)(C):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, dated and received in this Office on August 7, 2017, in which you request a copy of the affidavit of a named individual filed in USPS, Case No. 20-CA-178519. You assumed fees up to \$9.25.

We acknowledged your request on August 7, 2017.

To the extent your request seeks any affidavits, we can neither confirm nor deny that any such documents exist. Therefore, your request is denied, for the reasons outlined below.

Affidavits generally are records warranting privacy protection under Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) and (b)(7)(C). One's status, for example, as a union supporter or government informant or potential witness is a protectable privacy interest under Exemptions 6 and 7(C). *See, e.g., Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

Moreover, Exemption 7(D) assures that confidential sources are protected from retaliation to prevent the loss of valuable sources of information. *See United Technologies Corp. v. NLRB*, 777 F.2d 90, 94-95 (2d Cir. 1985) ("Employees are the principal, and in many cases the sole, source of the Board's information in unfair labor practice cases. . . . The Board's ability to grant adequate assurances of confidentiality is therefore essential to its ability to receive information."). To that end, Exemption 7(D) permits withholding any information furnished by a

source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

Further, as noted by the Supreme Court in *Dep't of Justice v. Landano*, 508 U.S. 165, 174 (1993), a source should be deemed confidential if the source furnished information with the understanding that the agency "would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes." The identity of a source is protected within the meaning of Exemption 7(D) whenever an agency can show that the source either "provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred." *Landano*, 508 U.S. at 172. And the identity of a source can be withheld under Exemption 7(D) even if his identity becomes known through other means. See e.g., *Jones v. F.B.I.*, 41 F. 3d 238 (6th Cir. 1994). This protection extends even when charging parties withdraw their NLRB claims and/or after a case has closed.

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested documents except that you will not be charged for the first two hours of search time. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$3.10 per quarter-hour or portion thereof of clerical time and \$9.25 per quarter-hour or portion thereof of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge for this request.

You may contact FOIA Specialist Lalitta Gillis at (202) 273-0101 or by email at Lalitta.Gillis@nrlb.gov who processed your request, as well as our FOIA Public Liaison at (202) 273-0902 or by email at FOIAPublicLiaison@nrlb.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov, telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.regulations.gov/foia/action/public/home>, by mail at: National

(b) (6), (b) (7)(C)

August 31, 2017

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Labor Relations Board, Division of Legal Counsel, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to [DLCFOIAAppeal@nrlb.gov](mailto:DLCFOIAAppeal@nrlb.gov), within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based. Should you have questions concerning this letter, you may contact Jolynne Miller, FOIA Supervisor, at (202) 273-1088, or by email at [Jolynne.Miller@nrlb.gov](mailto:Jolynne.Miller@nrlb.gov).

Sincerely,

*Synta E. Keeling /s/*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

May 17, 2018

David Rosenfeld  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501

Re: FOIA Case No. NLRB-2017-001954

Dear Mr. Rosenfeld:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on August 3, 2017, in which you request copies of all statements and affidavits filed by a specifically named individual in 14 cases involving Iron Workers Local 229. You agreed to assume financial responsibility for the processing of your request in the amount of \$30.00.

We acknowledged your request on August 3, 2017. We regret the delay in our final response.

To the extent your request seeks affidavits by a specifically named individual, after a search and review of the requested case files, we neither admit nor deny the existence of such records, as any such confirmation or denial would harm the privacy and identity source protections afforded by FOIA Exemptions 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(6), 7(C) and 7(D)). *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 67-69 (2d Cir. 2009); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C.Cir.1982). Moreover, to the extent that affidavit records exist, your request is denied, as they would be exempt from disclosure in full pursuant to FOIA Exemptions 6, 7(C), and 7(D).

Affidavits taken by the Regional Office during the investigation of a case are records warranting privacy protection, pursuant to FOIA Exemption 6, which protects information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C). An individual's status as a union

supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). *See, e.g., Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity of a confidential source...” 5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radovich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v).

David Rosenfeld

May 17, 2018

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Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Processing of this request required no review time. Accordingly, there is no charge for this request.

You may contact Michael A. Maddox, the FOIA Attorney-Advisor who processed your request, at 202-273-0013 or by email at Michael.Maddox@nrlb.gov, as well as our FOIA Public Liaison at (202) 273-0902 or by email at FOIAPublicLiaison@nrlb.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov, telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal with the Division of Legal Counsel (DLC) through FOIAonline at:

<https://foiaonline.regulations.gov/foia/action/public/home>, by mail at: National Labor Relations Board, Division of Legal Counsel, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to DLCFOIAAppeal@nrlb.gov, within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,

*Synta E. Keeling /s/*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

November 21, 2018

Leah C. Cook  
Taylor, Porter, Brooks & Phillips LLP  
450 Laurel Street  
8th Floor  
Baton Rouge, LA 70801

Re: FOIA Case No. NLRB-2019-000156

Dear Ms. Cook:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on November 15, 2018, in which you seek any and all documents submitted by a named individual, that individual's employer, or a labor union in *Newtron, LLC*, Case No. 15-CA-230329, including but not limited to any information, documents, charges, complaints, affidavits, statements, notes, correspondence, emails, forms, and audio or video recordings. You agreed to assume financial responsibility for the processing of your request in the amount of \$350.00.

We acknowledged your request on November 15, 2018. You acknowledged you are counsel for the Charged Party. In a telephone conversation with a member of the FOIA Branch staff, you indicated that you already have copies of the formal records found in the case file, which are publicly available.

After conducting a search of the Agency's electronic casehandling system, NxGen, I have determined that many of the records responsive to your request are part of an investigative file in an open case, and therefore, are privileged from disclosure pursuant to Exemption 7(A) of the FOIA, 5 U.S.C. § 552 (b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with enforcement proceedings. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Therefore, the investigatory records in the requested case file are being withheld in full pursuant to Exemption 7(A). Accordingly, your request is denied.

With respect to that portion of your request seeking case file records submitted by a certain named individual, the Agency neither admits nor denies the existence of any records you seek, because any such confirmation or denial would harm the privacy interest protected by FOIA Exemption 7(C), 5 U.S.C. § 552 (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir, 1976). The case law specifically establishes that FOIA Exemption 7(C) protects the privacy interests of individuals named or mentioned in an agency's law enforcement files, including charging parties, witnesses, investigators, informants, and suspects. See *Schrecker v. U.S. Dept. of Justice*, 349 F.3d 657, 661 (D.C. Cir, 2003).

Please be aware that case file records may become disclosable, subject to applicable exemptions, after the case closes, that is, once a Board decision issues, there has been full compliance with a settlement, or the case has otherwise been closed under Agency procedures. Accordingly, you may wish to file a new request at that time.

The status of this case can be tracked on the Agency website at [www.nlr.gov](http://www.nlr.gov) by going to the Cases & Decisions tab, clicking case search, entering the case number in the search box and viewing the case page or by clicking the link here: <https://www.nlr.gov/case/15-CA-230329>.

You may contact Teresita Sanabria, the FOIA Specialist who processed your request, at (202) 568-3531 or by email at [teresita.sanabria@nlrb.gov](mailto:teresita.sanabria@nlrb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nlrb.gov](mailto:FOIAPublicLiaison@nlrb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Leah C. Cook  
November 21, 2018  
Page 3

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.regulations.gov/foia/action/public/home> or by mail or email at:

Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

May 30, 2019

Sarah N. O'Keefe  
BurnsBarton PLC  
2201 East Camelback Road  
Suite 360  
Phoenix, AZ 85016

Re: FOIA Case No. NLRB-2019-000873

Dear Ms. O'Keefe:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on May 21, 2019, in which you seek the entire NLRB file of a specified individual. You assumed fees up to \$37.00.

We acknowledged your request on May 21, 2019. In a telephone conversation with a member of my staff on May 28, 2019, you confirmed that you do not have an NLRB case name, case number, or any clarifying information other than the specified individual's name, that would allow us to search for, identify and/or locate responsive records.

To the extent that your request seeks records involving a named individual, the Agency neither admits nor denies the existence of any such records because any such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Conducting a search by an individual's name, without an Agency case name or number, could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

Because a search for Agency records in our electronic casehandling system cannot be conducted with the information you provided, your request is denied. This denial does

Sarah N. O'Keefe

May 30, 2019

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not prohibit you from filing a new FOIA request in the future that contains appropriate identifying information such as NLRB case number, case name or employer information, and/or approximate filing date(s) or time periods of any records you are seeking.

You may contact Marissa Wagner, the FOIA Attorney who processed your request, at (202) 273-2957 or by email at [marissa.wagner@nrlb.gov](mailto:marissa.wagner@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

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National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
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Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
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<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

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Washington, D.C. 20570

Sarah N. O'Keefe

May 30, 2019

Page 3

Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

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Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 12, 2019

Michael Saltsman  
Center for Union Facts  
1090 Vermont Avenue NW  
Suite 800  
Washington, DC 20005

Re: FOIA Case No. NLRB-2018-000279

Dear Mr. Saltsman:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on December 15, 2017, seeking “all documents related to the approximately six-month suspension of Board practice” for a named individual. You agreed to pay fees in the amount of \$50.00 for the processing of your request.

We acknowledged your request on December 15, 2017. We regret the delay in our response.

Regarding your request for records about a specifically named individual, the Agency neither admits nor denies the existence of the information because any such confirmation or denial would harm the privacy interests protected by the FOIA. *See, e.g., People for the Ethical Treatment of Animals v. NIH (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).* Furthermore, to the extent such documents exist, they would be exempt from disclosure in full pursuant to FOIA Exemptions 6 and 7(C) (5 U.S.C. § 552(b)(6) and (b)(7)(C)), as explained below. Therefore, your request is denied.

Exemption 6 permits agencies to withhold information about individuals in “personnel and medical and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The “files” requirement covers all information that “applies to a particular individual.” *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982). *See also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir.

2006)(Exemption 6 should be “read . . . to exempt not just files, but also bits of personal information, such as names and addresses”). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers the following factors: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004).

With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment also constitute intrusions into privacy under Exemptions 6 and 7(C). *Id.* at 771. *See also Cameranesi v. U.S. Dep’t of Defense*, 856 F.3d 626, 638 (9th Cir. 2017), citing *U.S. Dep’t of State v. Ray*, 502 U.S. 154, 176-177 (1991); *Washington Post Co.*, 456 U.S. at 599 (the “primary purpose” of the exemption is “to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”)

Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. *See Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). This is so because merely being associated with an investigation, much less being the target of one, carries with it significant taint and can engender speculation and stigma. *See PETA*, 745 F.3d at 541-42 (and cases cited therein). *See also Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981), quoting *Baez v. Dep’t of Justice*, 647 F.2d 1328, 1338 (D.C. Cir. 1980) (“There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of [a law enforcement] investigation.”)

The Agency, pursuant to its Rules and Regulations, may at times investigate and process allegations of misconduct by an attorney or other party representative that occur during any stage of Agency proceedings. 29 C.F.R. § 102.177. Files pertaining to

such misconduct investigations, including any disciplinary measures imposed by the Agency upon completion of its investigation, are contained in an NLRB system of records entitled “Agency Disciplinary Case Files (Nonemployees)” (otherwise known as “AD Case Files”). Thus, to the extent the requested records even exist, they would be investigatory records created by the Agency for the purpose of enforcing its misconduct rules and contain identifying information that fits squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure.<sup>1</sup>

By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), quoting *Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat’l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest.”

No such public interest is evident here that outweighs the private interests identified above. See, e.g., *PETA*, 745 F.3d at 545 (stating that public interest in shedding light on agency investigatory procedures “insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing targets of an [Agency] investigation.”). Accordingly, for the foregoing reasons, the requested records you seek, to the extent any exist, are protected from disclosure under Exemptions 6 and 7(C).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i). In these circumstances, however, there is no charge for the processing of your FOIA request.

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<sup>1</sup> See *a/so* NLRB’s Rules and Regulations, Sections 102.119(k) – (l), which explain that the Agency has exempted “Agency Disciplinary Case Files (Nonemployees)” from the access provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2) because the system “contains investigatory material compiled for law enforcement purposes” the release of which “would seriously impair the ability of the NLRB to conduct investigations of alleged or suspected violations of the NLRB’s misconduct rules.” 29 C.F.R. § 102.119(k) - (l).

Michael Saltsman

August 12, 2019

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You may contact Marissa Wagner, the FOIA Attorney who processed your request, at (202) 273-2957 or by email at [marissa.wagner@nrlrb.gov](mailto:marissa.wagner@nrlrb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
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Washington, D.C. 20570  
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Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
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<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Chief FOIA Officer  
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Michael Saltsman

August 12, 2019

Page 5

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 22, 2019

Nam C. Van  
Valero  
One Valero Way  
San Antonio, TX 78249-1616

Re: FOIA Case No. NLRB-2019-001228

Dear Mr. Van:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on August 20, 2019, in which you seek a copy of an affidavit provided by a named individual in *Valero*, Case No. 16-CA-219623. You agreed to assume financial responsibility for all necessary costs associated with the request. You requested expedited processing of your request.

We acknowledged your request on August 20, 2019. Your request for expedited processing was denied on August 21, 2019.

To the extent your request seeks an affidavit provided by a specifically named individual, after a search and review of the requested case file, we neither admit nor deny the existence of such records, as any such confirmation or denial would harm the privacy and identity source protections afforded by FOIA Exemptions 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(6), 7(C) and 7(D)). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Moreover, to the extent that any such affidavit record exists, your request is denied, as it would be exempt from disclosure in full pursuant to FOIA Exemptions 6, 7(C), and 7(D).

Affidavits taken by the Regional Office during the investigation of a case are records warranting privacy protection, pursuant to FOIA Exemption 6, which protects information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could

reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C). An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source..." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." See *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radovich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through

litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Fifteen minutes of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$9.25.

To pay by check or money order (do not send cash), please send your payment - with the FOIA case number(s) written on the check or money order - and mail it to the NLRB FOIA Branch, 1015 Half Street SE, 4th Floor, Washington, DC 20570. Please make the check payable to the National Labor Relations Board. To pay by credit or debit card, please go to [www.pay.gov](http://www.pay.gov). \*\*Please note the FOIA case number(s) on your check or electronic payment to ensure that your payment will be properly credited.

You may contact Rosetta Lane, Attorney-Advisor who processed your request, at (202) 273-3811 or by email at [rosetta.lane@nrlb.gov](mailto:rosetta.lane@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

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Nam C. Van  
August 22, 2019  
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Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 30, 2019

Ryan Smith  
Frantz Ward, LLP  
200 Public Square, Suite 3000  
Cleveland, OH 44114

Re: FOIA Case No. NLRB-2019-001245

Dear Mr. Smith:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on August 26, 2019, in which you request a copy of the appeal filed by a named individual, “along with any documents or other records that [the individual] has provided the NLRB in support of [the] appeal”, in *St. Vincent Charity Medical Center*, Case No. 08-CA-239765. You also requested expedited processing.

We acknowledged your request on August 26, 2019. We have confirmed that your firm represents the Charged Party, St. Vincent Charity Medical Center. Your request for expedited processing is granted.

To the extent your request seeks records involving a specifically named individual, the Agency neither admits nor denies the existence of the information because any such confirmation or denial would harm the privacy interests protected by the FOIA. *See, e.g., People for the Ethical Treatment of Animals v. NIH (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).*

After conducting a search of the Agency’s electronic casehandling system, NxGen, I have determined that the record responsive to your request is part of an investigative file in open case pending in the Office of Appeals and is thus privileged from disclosure pursuant to FOIA Exemption 7(A). 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978).

However, in accordance with the General Counsel's longstanding policy of providing copies of an appeal statement to the parties in response to a FOIA request, I have attached a copy of the Charging Party's appeal form that was submitted in the requested case. Redactions have been made to portions of the record to protect the privacy interest of the individuals referenced in the record. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552 (b)(6) and (b)(7)(C). There were no accompanying documents filed with the appeal form.

We have placed you in fee category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you may "be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

However, as a matter of our administrative discretion, the Agency is voluntarily providing the requested record to you at no cost. This voluntary disclosure is non-precedential.

You may contact Ed Hughes, the FOIA attorney who processed your request, at (202) 273-1773 or by email at [ed.hughes@nrlb.gov](mailto:ed.hughes@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4th Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902

Ryan Smith  
August 30, 2019  
Page 3

Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home>  
or by mail or email at:

Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4th Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

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Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer

Ryan Smith  
August 30, 2019  
Page 4

Attachment: (one page)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

January 8, 2020

Kristin L. Martin  
McCracken, Stemerman  
& Holsberry, LLP  
595 Market Street, Suite 800  
San Francisco, CA 94105

Re: FOIA Case No. NLRB-2020-000263

Dear Ms. Martin:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on December 10, 2019, in which you request “all charges filed against any employer” by fifteen named individuals since October 2018. You assumed fees in the amount of \$200.00 for the processing of your request.

We acknowledged your request on December 10, 2019.

Your request as filed, seeking records filed by specifically named individuals, is denied.

The Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual’s name, without an NLRB case name or number could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities); *Schrecker v. Dep’t. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). Accordingly, because a search for Agency records cannot be conducted in our electronic casehandling system with the information you provided, your request is denied.

Kristin L. Martin  
January 8, 2020  
Page 2

Please be advised that you may submit a new FOIA request in the future that contains appropriate identifying information that would permit a search for records, such as NLRB case number, case name or employer/company information, and/or approximate filing date(s) or time periods for any records you are seeking.

You may contact Marissa Wagner, the FOIA Attorney who processed your request, at (202) 273-2957 or by email at [marissa.wagner@nrlb.gov](mailto:marissa.wagner@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor

Kristin L. Martin  
January 8, 2020  
Page 3

Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

February 21, 2020

Mollie Simon  
c/o Ariana Tobin  
ProPublica  
155 Avenue of the Americas, 13th Floor  
New York, NY 10013

Re: FOIA Case No. NLRB-2020-000438

Dear Ms. Simon:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on February 4, 2020, in which you seek copies of despositions from a specifically named individual and any other individuals, the 9/23/2016 Pre-Hearing Brief filed by the Charged Party, and 9/23/2016 Post Hearing Brief filed by NLRB-GC in *Arise Virtual Solutions, Inc.*, Case No. 12-CA-144223. You agreed to assume financial responsibility for the processing of your request in the amount of \$50.00.

We acknowledged your request on February 4, 2020.

Your request is granted in part and denied in part, as explained below.

With regards to the hearing briefs, a search of the Agency's electronic casehandling system, NxGen, has been conducted. Your request for the 9/23/2016 Pre-Hearing Brief filed by the Charged Party, and 9/23/2016 Post Hearing Brief filed by NLRB-GC is granted and the responsive records are attached.

The portion of your request seeking depositions from a specifically named individual, however, is denied. The Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir, 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* ("PETA"), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding "Glomar" response appropriate for third-party request seeking documents revealing whether NIH had

investigated three named researchers). Conducting a search by an individual's name, without an NLRB case name or number could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). Accordingly, because a search for Agency records cannot be conducted in our electronic casehandling system with the information you provided, your request is denied.

To the extent you seek depositions from any individual, we have reasonably interpreted your request to seek affidavits in the requested case file since the Agency does not take depositions during the course of investigating or litigating a case. This portion of your request is also denied. Affidavits obtained by the Regional Office during the investigation of a case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6) and (b)(7)(C) and (b)(7)(D).

An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." See *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation

can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request.

You may contact Lalitta Gillis, the FOIA Specialist who processed your request, at (202) or by email at [Lalitta.Gillis@nrlb.gov](mailto:Lalitta.Gillis@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Mollie Simon  
February 21, 2020  
Page 4

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

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Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer

Attachment: (85 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

April 3, 2020

Ms. Peyton Nill  
845 Peppervine Avenue  
St. Johns, Florida 32259

Re: FOIA Case No. NLRB-2020-000657

Dear Ms. Nill:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on March 31, 2020, in which you seek all documents in *Artsy Abode Boutique*, Case Number 12-CA-133089 including the identity of the parties that filed the charge. You agreed to assume financial responsibility for the processing of your request in the amount of \$5.00.

We acknowledged your request on March 31, 2020.

Your request is granted in part and denied in part, as explained below.

Regarding your request for the identity of the charging parties in this case, the charging parties' identity is protected under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). Conducting a search by an individual's name could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). Accordingly, that portion of your request is denied.

Notwithstanding, a search of the Agency's electronic casehandling system, NxGen, has been conducted for the case number you provided. This search has yielded 15 pages of responsive, releasable records from the requested case file, which are attached.

After a review of the responsive records, I have determined that portions of the records are exempt from disclosure under Exemptions 6, and 7(C) of the FOIA. The records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically, redactions have been made to the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6), (b)(7)(C).

Your request is also denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 5 (5 U.S.C. § 552(b)(5)).

Regarding the records being withheld, four pages are withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), including an Internal case log and internal agency memoranda.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within an agency and to prevent a premature disclosure that could disrupt and harm the agency’s decision-making process. *Id.* at 150-152. The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it

makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). The protected status of a predecisional record is not altered by the subsequent issuance of a decision, see, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005), by the agency opting not to make a decision, see *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep’t of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney’s opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F.Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process privilege and the attorney work-product doctrine. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency

that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. In sum, the records are being withheld in their entirety.

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge assessed for this request.

You may contact Joseph Mullaney, Attorney-Advisor who processed your request, at (202) 273-3863 or by email at [Joseph.Mullaney@nrlb.gov](mailto:Joseph.Mullaney@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS

Ms. Peyton Nill  
April 3, 2020  
Page 5

College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer

Attachment: (15 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

April 17, 2020

Susan Horneker  
Ogletree, Deakins, Nash, Smoak  
And Steward, P.C.  
7700 Bonhomme Avenue, Suite 650  
St. Louis, MO 63105

Re: FOIA Case No. NLRB-2020-000352

Dear Ms. Horneker:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on January 13, 2020, in which you requested all records in *VendTech-SGI, LLC*, Case No. 14-CA-232814. You assumed financial responsibility for the processing of your request in the amount of \$100.00.

We acknowledged your request on January 13, 2020. In a telephone conversation with a member of my staff on January 27, 2020, you modified your request to be seeking the records submitted by the Charging Party including any affidavits. We regret the delay in our final response.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. This search has yielded 93 pages of responsive, releasable records from the requested case file, which are attached.

After a review of the responsive records, I have determined that portions of them are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). These records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the responsive records. Specifically, redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the

release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C).

As to your request seeking any affidavits filed by the charging party, the Agency neither admits nor denies the existence of any such records in the file because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).

Any affidavits obtained by the Regional Office during its investigation of the case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D). To begin with, an individual’s status as a union supporter, government informant or potential witness is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and persons mentioned in government files have a “strong” privacy interest in non-disclosure of their identities). In addition, because affidavits would contain information provided to the Agency under an express promise of confidentiality, they are also protected from disclosure under Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity of a confidential source . . .”

5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” See *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep’t of Justice*,

Susan Horneker

April 17, 2020

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636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of reviewing for release the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Two hours of professional time was expended in reviewing for release the requested material. Accordingly, please remit \$74.00.

To pay by check or money order (do not send cash), please send your payment - with the FOIA case number(s) written on the check or money order - and mail it to the NLRB FOIA Branch, 1015 Half Street SE, 4th Floor, Washington, DC 20570. Please make the check payable to the National Labor Relations Board. To pay by credit or debit card, please go to [www.pay.gov](http://www.pay.gov). \*\*Note the FOIA case number(s) on your check or electronic payment to ensure that your payment will be properly credited.

You may contact Teresita Sanabria, the FOIA Specialist who processed your request, at (202) 568-3531 or by email at [teresita.sanabria@nrlb.gov](mailto:teresita.sanabria@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902

Susan Horneker

April 17, 2020

Page 4

Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

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<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
Freedom of Information Act Officer

Attachment: (93 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

July 17, 2020

Steven Swirsky  
Epstein Becker & Green  
875 Third Avenue  
New York, NY 10022

Re: FOIA Case No. NLRB-2020-000945

Dear Mr. Swirsky:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on June 19, 2020, in which you sought all non-privileged materials records from fifteen different case files, as well as records concerning two named individuals. You assumed financial responsibility for the processing of your request in the amount of \$500.00.

We acknowledged your request on June 19, 2020.

In a communication with a member of my staff on June 23, 2020, it was explained that your initial FOIA request had been split up into three separate requests in order to ensure the orderly and efficient processing of this voluminous request. Specifically, you were informed that the portion of your request seeking records from Case Nos. 02-CA-193861, 02-CA-193884, 02-CA-194564, 02-CA-196283, and 02-CA-241469 would be addressed in NLRB-2020-000934, and that the remaining requested records would be assigned to one of two new request numbers (NLRB-2020-000944 and NLRB-2020-000945) and addressed separately. You were also informed that \$167.00 had been allocated for the processing of each smaller request based on your initial fee assumption.

In a subsequent email dated June 29, 2020, you agreed to narrow the scope of each of your FOIA requests to the formal records and party position statements contained in the requested case files.

This response (NLRB-2020-000945) processes the portion of your initial request seeking records from Case Nos. 02-CB-205495, 02-CA-251701, 02-CA-252504, 02-CB-252922, 02-CB-230483, and 02-CB-231842.

As an initial matter, and as was previously explained to you in an email dated June 23, to the extent your request seeks records involving named individuals, the Agency neither admits nor denies the existence of any such records because any such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual’s name, without an Agency case name or number, could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities); *Schrecker v. Dep’t. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

A search of the Agency’s electronic casehandling system, NxGen, has been conducted. This search has yielded 78 pages of responsive records from the case files for 02-CB-205495, 02-CA-251701, 02-CA-252504, 02-CB-252922, 02-CB-230483, and 02-CB-231842, which are attached. After a review, I have determined that portions of the attached records are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). These records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the responsive records.

Specifically, redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the

records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

One hour and forty-five minutes of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$64.75.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Timothy Bearese, the Attorney-Advisor who processed your request, at (202) 273-3752 or by email at [Timothy.Bearese@nrlb.gov](mailto:Timothy.Bearese@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS

Steven Swirsky  
July 17, 2020  
Page 4

College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*Patricia A. Weth*

Patricia A. Weth  
Acting FOIA Officer

Attachment: (78 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

July 30, 2020

Steven Swirsky  
Epstein Becker & Green  
875 Third Avenue  
New York, NY 10022

Re: FOIA Case No. NLRB-2020-000944

Dear Mr. Swirsky:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on June 19, 2020, in which you are seeking all non-privileged materials records from fifteen different case files, as well as records concerning two named individuals. You assumed financial responsibility for the processing of your request in the amount of \$500.00.

We acknowledged your request on June 19, 2020. In a communication with a member of my staff on June 23, 2020, it was explained that your initial FOIA request had been split up into three separate requests in order to ensure the orderly and efficient processing of this voluminous request. Specifically, you were informed that, among other things, the portion of your request seeking records from Case Nos. 02-CA-193861, 02-CA-193884, 02-CA-194564, 02-CA-196283, and 02-CA-241469 would be addressed in NLRB-2020-000934, and that the remaining requested records would be assigned to one of two new request numbers (NLRB-2020-000944 and NLRB-2020-000945) and responded to separately. You were also informed that \$167.00 had been allocated for the processing of each smaller request based on your initial fee assumption. In a subsequent email on June 29, 2020, you agreed to narrow the scope of each of your FOIA requests to the formal records and party position statements in the requested case files.

This response (NLRB-2020-000944) processes the portion of your initial request seeking records from Case Nos. 02-CA-234796, 02-CA-234797, 02-CA-236053 and 02-CA-236109.

As an initial matter, and as was previously explained in the June 23 email, to the extent your request seeks records concerning named individuals, the Agency neither admits nor denies the existence of any such records because any such

confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual’s name could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities); *Schrecker v. Dep’t. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

A search of the Agency’s electronic casehandling system, NxGen, has been conducted for responsive records, as narrowed by you, in the four case files. This search has yielded 70 pages of records from Case Nos. 02-CA-234796, 02-CA-234797, 02-CA-236053 and 02-CA-236109, which are attached. Redactions have been made to portions of the responsive records to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which pertains to information the release of which “could reasonably be expected to disclose the identity of a confidential source...” where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

One hour and fifteen minutes of professional time was expended reviewing for release the requested material. Accordingly, please remit \$46.25.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Michael A. Maddox, the Attorney-Advisor who processed your request, at (202) 273-0013 or by email at [Michael.Maddox@nrlb.gov](mailto:Michael.Maddox@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
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Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

Steven Swirsky  
July 30, 2020  
Page 4

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*Patricia A. Weth*

Patricia A. Weth  
Acting FOIA Officer

Attachment: (70 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 27, 2020

Steven Swirsky  
Epstein Becker & Green  
875 Third Avenue  
New York, NY 10022

Re: FOIA Case No. NLRB-2020-000934

Dear Mr. Swirsky:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on June 19, 2020, in which you sought all non-privileged records from fifteen different case files, as well as records concerning two named individuals. You assumed financial responsibility for the processing of your request in the amount of \$500.00.

We acknowledged your request on June 19, 2020.

In a communication with a member of my staff on June 23, 2020, it was explained that your initial FOIA request had been split up into three separate requests in order to ensure the orderly and efficient processing of this voluminous request. Specifically, you were informed that the portion of your request seeking records from Case Nos. 02-CA-193861, 02-CA-193884, 02-CA-194564, 02-CA-196283, and 02-CA-241469 would be addressed in NLRB-2020-000934, and that the remaining requested records would be assigned to one of two new request numbers (NLRB-2020-000944 and NLRB-2020-000945) and addressed separately. You were also informed that \$167.00 had been allocated for the processing of each smaller request based on your initial fee assumption.

In a subsequent email dated June 29, 2020, you agreed to narrow the scope of each of your FOIA requests to the formal records and party position statements contained in the requested case files.

This response (NLRB-2020-000934) processes the portion of your initial request seeking records from Case Nos. 02-CA-193861, 02-CA-193884, 02-CA-194564, 02-CA-196283, and 02-CA-241469.

As an initial matter, and as was previously explained to you in an email dated June 23, to the extent your request seeks records involving named individuals, the Agency neither admits nor denies the existence of any such records because any such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual’s name, without an Agency case name or number, could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities); *Schrecker v. Dep’t of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

A search of the Agency’s electronic casehandling system, NxGen, has been conducted. This search has yielded 114 pages of responsive, releasable records from the case files for 02-CA-193861, 02-CA-193884, 02-CA-194564, 02-CA-196283, and 02-CA-241469, which are attached. After a review, I have determined that portions of the attached records are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). These records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the responsive records.

Specifically, redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C). Please note that certain pages have solid black markings and solid white markings. These /markings were in made in the original submission to the Agency and were not made by this office. Redactions made by the FOIA Branch appear as black marks with a white overlay text with the applicable FOIA exemptions noted.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose

behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Four hours and thirty minutes of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$166.50.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Patrick Plummer, the Attorney-Advisor who processed your request, at (202) 273-2999 or by email at [Patrick.Plummer@nrlb.gov](mailto:Patrick.Plummer@nrlb.gov), as well as the Agency’s FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4th Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Steven Swirsky  
August 27, 2020  
Page 4

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4th Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

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Sincerely,

*Patricia A. Weth*

Patricia A. Weth  
Acting FOIA Officer

Attachment: (114 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

November 17, 2020

Kathryn A. Woods  
Jackson Lewis P.C.  
Wedge International Tower  
1415 Louisiana Street, Suite 3325  
Houston, TX 77002

Re: FOIA Case No. NLRB-2021-000051

Dear Ms. Woods:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on October 16, 2020, in which you seek “[a]ny and all records and/or recording relating to Case 16-CA-236982, Calumet Specialty Products,” filed by a named individual. You agreed to assume financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on October 16, 2020.

Your request is granted in part and denied in part, as explained below.

The Agency neither admits nor denies that the requested case was filed by the individual named in your request because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).

However, given your provision of a case number, a search of the Agency’s electronic casehandling system, NxGen was conducted for records in the specified case. This search has yielded 22 pages of responsive, releasable records, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and

(b)(7)(C). The records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically, redactions have been made to the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6), (b)(7)(C).

Your request is also denied to the extent that nine pages of responsive records are being withheld in their entirety pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)). These records include internal memoranda, internal communications, final investigative reports, Agenda Minutes, and casehandling logs.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a

predecisional record is not altered by the subsequent issuance of a decision, see, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the

commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v).

Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Thirty minutes of professional time was expended in reviewing for release the requested material. Accordingly, please remit \$18.50.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Jodilyn Breirather, the FOIA Specialist who processed your request, at (202) 368-1927 or by email at [Jodilyn.Breirather@nrlb.gov](mailto:Jodilyn.Breirather@nrlb.gov), as well as the Agency’s FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Kathryn A. Woods  
November 17, 2020  
Page 5

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nllrb.gov](mailto:DLCFOIAAppeal@nllrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachment: (22 pages)



**UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
FREEDOM OF INFORMATION ACT BRANCH**  
Washington, D.C. 20570

Via email

April 2, 2021

Joshua S. Hawley  
1248 Sabattus Street  
Lewiston, ME 04240

Re: FOIA Case No. NLRB-2021-000571

Dear Mr. Hawley:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on Sunday, March 7, 2021, and received in this Office on Monday, March 8, 2021, in which you seek the following: “Looking for documents relating whatsoever to any complaints filed against, fees/fines levied on, or decisions made relating to [a named individual] or ARGO Marketing Group. This includes any records or communications that mention either person or entity even once.” You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on March 7, 2021.

Your request is granted in part and denied in part, as explained below.

The Agency neither admits nor denies that any records exist involving the individual named in your request because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).

However, given your provision of an employer, ARGO Marketing Group, a search was conducted for records involving this employer in the Agency’s electronic casehandling system, NxGen, which generally maintains NLRB case records from 2011 to present. This search yielded no responsive records.

Joshua S. Hawley

April 2, 2021

Page 2

Pursuant to the Agency's record retention and disposition policy, records are retained for a six-year period, which commences at the close of the calendar year during which the case is closed. The records are then destroyed, unless they are selected for permanent retention based on their legal significance. A search was made of the list of permanently retained cases maintained by the Agency's Case Records Unit for cases closed between 1982 and 2010, and it was confirmed that no records involving the requested employer were selected for permanent retention.

Additional searches of the Agency's website, [www.nlr.gov](http://www.nlr.gov), as well as the Agency's custom document search tool Integrated Search, or "iSearch," were conducted. Neither of these electronic searches identified any responsive records or case files.

Accordingly, there are no records responsive to your request.

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge assessed for this request.

You may contact Jodilyn Breirather, the FOIA Specialist who processed your request, at (202) 368-1927 or by email at [Jodilyn.Breirather@nlrb.gov](mailto:Jodilyn.Breirather@nlrb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nlrb.gov](mailto:FOIAPublicLiaison@nlrb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nlrb.gov](mailto:DLCFOIAAppeal@nlrb.gov)

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Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

February 23, 2021

(b) (6), (b) (7)(C)

Re: FOIA Case No. NLRB-2021-000403

Dear (b) (6), (b) (7)(C):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on January 25, 2021, in which you seek “the signed statements/affidavits of the employees/security officers/PSO's confirming that they did not sign union cards for the union, Security Police Fire Professionals of America” in *Triple Canopy*, Case Nos. 04-CA-248321 and *International Union of Security, Police and Fire Professionals of America (Triple Canopy)*, Case No. 04-CB-248347.

We acknowledged your request on January 25, 2021.

Your request as filed, seeking statements or affidavits submitted employees/security officers of the charged party employer, is denied. The Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Affidavits obtained by the Regional Office during the investigation of a case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6) and (b)(7)(C) and (b)(7)(D), as explained below.

An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity of a confidential source . . .” 5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” See *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep’t of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733.

Any affidavits which may be in the case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D). You may contact Patrick Plummer, the FOIA Attorney who processed your request, at (202) 273-2999 or by email at [patrick.plummer@nrlb.gov](mailto:patrick.plummer@nrlb.gov), as well as the Agency’s FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

(b) (6), (b) (7)(C)

February 23, 2021

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After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling  
FOIA Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

April 13, 2021

Tonya L. Kennish  
U.S. Postal Service  
2400 Market Street, Room 2400  
St. Louis, MO 63155

Re: FOIA Case No. NLRB-2021-000740

Dear Ms. Kennish:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on April 12, 2021, in which you requested a:

1. Copy of Affidavit taken of [named] Charging Party . . . in Case 09-CB-272011 during timeframe of 1/29/21 to 4/9/21;
2. Copy of Advice Memorandum or equivalent document from Office of NLRB Ethics to Zuzana Murarova regarding taking Affidavit of [named individual] in Case 09-CB-272011 during timeframe of 1/29/21 to 4/9/21;
3. Copy of Advice email(s) letters from Office of NLRB Ethics to Zuzana Murarova regarding taking Affidavit of [named individual] in Case 09-CB-272011 during timeframe of 1/29/21 to 4/9/21.

You assumed fees in the amount of \$37.00 to process your request.

We acknowledged your request on April 9, 2021.

To the extent your request seeks records involving a specifically named individual, we neither admit nor deny the existence of such records because any such confirmation or denial would harm the privacy and identity source protections afforded by FOIA Exemptions 6 and 7(C) (5 U.S.C. § 552(b)(6) and 7(C)). *See Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir, 1976). Conducting a search by an individual's name could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals

Tonya L. Kennish

April 13, 2021

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named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectable privacy interest. *See, e.g., Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

However, given your provision of a case number, a search of the Agency's electronic casehandling system, NxGen was conducted. As a result of that search, I have determined that your request must be denied. The records responsive to your request are part of the investigative file in Case 09-CB-272001. Because this case is open, the records you seek are exempt from disclosure pursuant to FOIA Exemption 7(A). 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Therefore, the investigatory records you seek in the requested case file are being withheld pursuant to Exemption 7(A).

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge assessed for this request.

You may contact Ed Hughes, the FOIA attorney who processed your request, at 202 273-1773 or by email at [ed.hughes@nrlb.gov](mailto:ed.hughes@nrlb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor

Tonya L. Kennish

April 13, 2021

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Washington, D.C. 20570

Email: FOIAPublicLiaison@nrlrb.gov

Telephone: (202) 273-0902

Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road-OGIS

College Park, Maryland 20740-6001

Email: ogis@nara.gov

Telephone: (202) 741-5770

Toll free: (877) 684-6448

Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt

Chief FOIA Officer

National Labor Relations Board

1015 Half Street, S.E., 4<sup>th</sup> Floor

Washington, D.C. 20570

Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney FOIA Officer, or the FOIA Public Liaison) and/or

OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

Tonya L. Kennish  
April 13, 2021  
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/s/ *Synta E. Keeling*

Synta E. Keeling  
FOIA Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

January 14, 2021

Marek Pienkos  
101 W. Broadway, Suite 1200  
San Diego, CA 92101

Re: FOIA Case No. NLRB-2021-000228

Dear Mr. Pienkos:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this office on December 9, 2020, in which you seek: a copy of the “NLRB Appeal-Amended dated May 31/June 27, 2016” submitted by a specifically named individual in *Teamsters Local 848*, Case No. 21-CB-166691; all documents related to any filings by a specifically named individual with NLRB as to Shippers Transport Express, Inc.; and all documents related to any filings by a specifically named individual with NLRB as to any companies, aside from Shippers Transport Express, Inc., over the past 10 years. You agreed to assume financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on December 9, 2020. On December 16, 2020, in an email with a member of my staff, you agreed to assume additional fees for the processing of your request in the amount of \$296.00. On December 17, 2020, in an email with a member of my staff, you clarified that you seek all documents filed in *Teamsters Local 848*, Case Number 21-CB-166691.

Your request is granted in part and denied in part, as explained below.

To the extent that you seek information pertaining to a specific individual, the Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir, 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* (“PETA”), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding “Glomar” response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual’s name, without an NLRB case name or

number, could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). Because you provided a case number, a search was conducted for records in that case file.

A search of the Agency's electronic casehandling system, NxGen, has been conducted using the requested case number, 21-CB-166691. This search has yielded 352 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of the records from case number 21-CB-166691 are exempt from disclosure under Exemptions 4, 6, 7(C), and 7(D) of the FOIA (5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D)). The records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically a few redactions were made pursuant to Exemption 4 of the FOIA, which protects "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The information, which includes economic proposals, was submitted to the Agency by the employers in response to the Region's investigation of the unfair labor practice charges. Because the submitter does not customarily release this information to the public and it is not available to the public from any other sources, the information is confidential for purposes of Exemption 4 and has been redacted. *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2363 (2019).

Further, redactions have been made the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which pertains to information the release of which "could reasonably be expected to disclose the identity of a confidential source..." where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 5, 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)).

Regarding the records being withheld, 41 pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including a casehandling log, internal communications, and memoranda.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within an agency and to prevent a premature disclosure that could disrupt and harm the agency’s decision-making process. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 at 150-152. The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

Other investigatory records, totaling 100 pages, are being withheld in their entirety and/or partially redacted under FOIA Exemptions 6, 7(C), and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all

information that “applies to a particular individual.” *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). “‘Similar files’ has been interpreted broadly to include ‘[g]overnment records on an individual which can be identified as applying to that individual.’” *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, \*8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, \*3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6,).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The records are exempt from disclosure under the above balancing test, and are, thus, being withheld. The withheld records are investigative files created or obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the

FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest." No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, the records are protected from disclosure under Exemptions 6 and 7(C).

In addition to Exemptions 6 and 7(C), other records are being withheld under Exemption 7(D). They contain information provided to the Agency under an express promise of confidentiality, and, accordingly, are exempt from disclosure. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radovich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733.

Please note that portions of the attached records have solid black markings. These markings were in the original records and were not made by this office pursuant to the FOIA. Redactions made by the FOIA Branch appear as black marks with a white overlay text with the applicable FOIA exemptions noted.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Six hours of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$222.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Stephanie Ostrowski, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at [stephanie.ostrowski@nlrb.gov](mailto:stephanie.ostrowski@nlrb.gov), as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth  
FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570

Marek Pienkos  
January 14, 2021  
Page 8

Email: FOIAPublicLiaison@nlrb.gov  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: ogis@nara.gov  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: DLCFOIAAppeal@nlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or

OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Marek Pienkos  
January 14, 2021  
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Synta E. Keeling  
FOIA Officer

Attachment: (352 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

July 14, 2021

Kara Maruszczak  
Owens Corning  
One Owens Corning Parkway  
Toledo, OH 43659

Re: FOIA Case No. NLRB-2021-001049

Dear Ms. Maruszczak:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on June 24, 2021, in which you seek "[c]opies of all non-privileged records created by the NLRB or in the NLRB's possession or control" pertaining to a specifically named individual.

We acknowledged your request on June 24, 2021. In an email on June 25, 2021, a member of my staff advised you that we cannot conduct a search for named individuals' information due to privacy interests. At that time, you were asked to provide a case name or number for us to conduct a search and to assume fees for search and review. You were further advised that if you did not contact the FOIA Branch by July 12, 2021, your request would be closed. To date, the FOIA Branch has not received any response from you.

Your request as filed, seeking records filed by or about a specifically named individual, is denied.

The Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* ("PETA"), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding "Glomar" response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).

Conducting a search by an individual's name, without an NLRB case name or number, could constitute an unwarranted invasion of personal privacy of that

Kara Maruszczak

July 14, 2021

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individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. *See, e.g., Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

Accordingly, because a search for Agency records cannot be conducted in our electronic casehandling system with the information you provided, your request is denied.

In the future, if you are interested in NLRB records, you may submit a new FOIA request that contains appropriately descriptive information that would permit a search for records, such as NLRB case number or case name, or employer, company, or union name. Also, your FOIA request must include an assumption of fees for search and review.

You may contact Timothy Bearese, the Attorney-Advisor who processed your request, at (202) 273-3752 or by email at [Timothy.Bearese@nrlrb.gov](mailto:Timothy.Bearese@nrlrb.gov), as well as the Agency's FOIA Public Liaison for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlrb.gov](mailto:FOIAPublicLiaison@nrlrb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

Kara Maruszczak

July 14, 2021

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Telephone: (202) 741-5770

Toll free: (877) 684-6448

Fax: (202) 741-5769

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

July 27, 2021

Ava J. Schroen  
Ogletree Deakins Nash Smoak & Stewart  
301 Congress Avenue, Suite 1150  
Austin, TX 78701

Re: FOIA Request NLRB-2021-000902

Dear Ms. Schroen:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on May 5, 2021, in which you seek all records in *South Austin BMW, LLC d/b/a BMW of South Austin*, Case No. 16-CA-249155. You agreed to assume financial responsibility for the processing of your request in the amount of \$333.00.

We acknowledged your request on May 5, 2021. In an email exchange on June 4, 2021, you confirmed your request for the entire case file and assumed up to \$333.00 in fees for the processing of your request.

Your request is granted in part and denied in part, as explained below.

As an initial matter, to the extent that your FOIA request, and records submitted in conjunction with your FOIA request, references specifically named individuals, the Agency neither admits nor denies the existence of any such records because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* ("PETA"), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding "Glomar" response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers). Conducting a search by an individual's name, without an NLRB case name or number could constitute an unwarranted invasion of personal privacy of that individual. FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. See, e.g., *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a

“strong” privacy interest in nondisclosure of their identities); *Schrecker v. Dep’t. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

A search of the Agency’s electronic casehandling system, NxGen, has been conducted using the case number provided in your request. This search has yielded 193 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 6, 7(C), and 7(D) of the FOIA (5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D)). The records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically, redactions have been made the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which pertains to information the release of which “could reasonably be expected to disclose the identity of a confidential source...” where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 4, 5, 6, 7(C), and 7(D) (5 U.S.C. § 552 (b)(4), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)).

Specifically, I have determined that five pages of records are withheld pursuant to Exemption 4 of the FOIA. Exemption 4 protects "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4).

The withheld records contain confidential commercial or financial information about the employer. Specifically, the records, which include a summary of the Employer’s date-specific new vehicle inventory, were submitted to the Agency during the Region’s investigation of the unfair labor practice charge. Because the submitter does not customarily release this information to the public and it is not available to the public from any other sources, the information is confidential for purposes of Exemption 4. *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2363 (2019)

Regarding the records being withheld 26 pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including internal Agency subpoena

applications, casehandling logs, and final investigative reports from regional office personnel recommending case disposition.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a

requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

Other investigatory records are being withheld in their entirety and/or partially redacted under FOIA Exemptions 6, 7(C), and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all information that "applies to a particular individual." *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). "'Similar files' has been interpreted broadly to include '[g]overnment records on an individual which can be identified as applying to that individual.'" *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, \*8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141,

198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, \*3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6.).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The records are exempt from disclosure under the above balancing test, and are, thus, being withheld. The withheld records are investigative files created or obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat’l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own

sake . . . [and that] the information is likely to advance that interest.” No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, the records are protected from disclosure under Exemptions 6 and 7(C).

In addition to Exemptions 6 and 7(C), these records are withheld under Exemption 7(D). They contain information provided to the Agency under an express promise of confidentiality, and, accordingly, are exempt from disclosure. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity of a confidential source . . .” 5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” See *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radovich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep’t of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has been closed. *Ortiz*, 70 F.3d at 733.

Finally, our search for records in the requested case files identified records that originated with another federal agency, so we are referring those records to that agency. Specifically, we identified 66 pages of responsive records in Case No. 16-CA-249155 that originated with the U.S. Equal Employment Opportunity Commission (EEOC). Therefore, I am referring those records to the EEOC FOIA Public Liaison for their processing and direct response to you. In the event you have questions regarding this referral, please contact that agency using the contact information below:

Stephanie D. Garner  
Assistant Legal Counsel/FOIA  
EEOC - OLC/FOIA Programs  
131 M Street NE, Suite 5NW02E  
Washington, DC 20507  
(202) 663-4634  
FOIA@eeoc.gov

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Eight hours of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$296.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Patrick Plummer, the Attorney-Advisor who processed your request, at 202-273-2999 or by email at [patrick.plummer@nrlrb.gov](mailto:patrick.plummer@nrlrb.gov), as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

FOIA Public Liaison  
National Labor Relations Board

Ava J. Schroen

July 27, 2021

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1015 Half Street, S.E., 4<sup>th</sup> Floor

Washington, D.C. 20570

Email: FOIAPublicLiaison@nrlb.gov

Telephone: (202) 273-0902

Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road-OGIS

College Park, Maryland 20740-6001

Email: ogis@nara.gov

Telephone: (202) 741-5770

Toll free: (877) 684-6448

Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt

Chief FOIA Officer

National Labor Relations Board

1015 Half Street, S.E., 4<sup>th</sup> Floor

Washington, D.C. 20570

Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Ava J. Schroen  
July 27, 2021  
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Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachment: (193 pages)

cc: Stephanie D. Garner, EEOC – OLC/FOIA Programs (letter only)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 4, 2021

Michael A. Gillman  
O'Donoghue & O'Donoghue LLP  
5301 Wisconsin Avenue NW, Suite 800  
Washington, DC 20015

Re: FOIA Case No. NLRB-2021-001134

Dear Mr. Gillman:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on July 19, 2021, in which you requested a “copy of the appeal as well as any supporting brief or statement in support of that appeal filed by [a named individual]” in *International Union of Elevator Constructors, Local Union No. 7 (Schindler Elevator Corporation)*, Case No. 05-CB-277414. You assumed fees up to \$50.00 to process your request.

We acknowledged your request on July 19, 2021. We have confirmed that you are counsel for the Charged Party, International Union of Elevator Constructors, Local Union No. 7.

To the extent your request references a named individual, please be advised that we do not search for records by individual name because conducting a search by an individual's name could constitute an unwarranted invasion of personal privacy of that individual. FOIA law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, and informants have such a protectible privacy interest. *See, e.g., Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992); *Schrecker v. Dep't. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

However, given that you provided a case name and number, a search of the Agency's electronic casehandling system, NxGen, was able to be conducted and located responsive records - the Charging Party's appeal form and one-page statement - in the requested case. I have confirmed that these records are part of the investigative file in an open case before the Agency's Office of Appeals, and would normally be exempt from disclosure pursuant to FOIA Exemption 7(A). 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) allows an agency to withhold records

Michael A. Gillman

August 4, 2021

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included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978).

However, in accordance with the General Counsel's longstanding policy of providing copies of submitted appeals to a party in response to a FOIA request, I have attached a copy of the appeal form and one-page statement. After my review, I have determined that certain portions are exempt from disclosure under Exemptions 6, 7(C) and 7(D) of the FOIA, (5 U.S.C. § 552 (b)(6), (b)(7)(C), and (b)(7)(D)). Specifically, redactions have been made pursuant to Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which permits an agency to withhold records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source. There was no other supporting brief or material.

We have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you may "be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

However, as a matter of our administrative discretion, the Agency is voluntarily providing the requested records to you at no cost. This voluntary disclosure is non-precedential.

You may contact Ed Hughes, the FOIA Attorney who processed your request, at 202 273-1773 or by email at [ed.hughes@nrlb.gov](mailto:ed.hughes@nrlb.gov), as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor

Michael A. Gillman

August 4, 2021

Page 3

Washington, D.C. 20570

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Nancy E. Kessler Platt

Chief FOIA Officer

National Labor Relations Board

1015 Half Street, S.E., 4<sup>th</sup> Floor

Washington, D.C. 20570

Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Michael A. Gillman  
August 4, 2021  
Page 4

Synta E. Keeling  
Freedom of Information Act Officer

Attachment: (two pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

August 5, 2021

Re: FOIA Request NLRB-2021-001119

Dear Kelly Hughes (Ogletree Deakins):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this office on July 14, 2021, in which you seek all documents in *FDM Business Development LLC*, Case Number 10-CA-236785. Your request also identified a name individual. You agreed to assume financial responsibility for the processing of your request in the amount of \$222.00.

We acknowledged your request on July 14, 2021.

As an initial matter, with respect to the individual you named in your request, the Agency neither admits nor denies that these records involve this named individual because such confirmation or denial would harm the privacy interests protected by Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and (b)(7)(C). See *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir, 1976). See, e.g., *People for the Ethical Treatment of Animals v. NIH* ("PETA"), 745 F.3d 535, 541-42 (D.C. Cir. 2014) (holding "Glomar" response appropriate for third-party request seeking documents revealing whether NIH had investigated three named researchers).

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, has been conducted using the case number provided in the request. This search has yielded 105 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 5, 6, 7(C), and 7(D) of the FOIA (5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D)). The records are being provided to you partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically, redactions have been made to the records to protect records that are either attorney work-product or would reveal the deliberative process of the regional office in processing the charge. Additionally, redactions have been made the records to protect the privacy

interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which pertains to information the release of which “could reasonably be expected to disclose the identity of a confidential source...” where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 5, 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)).

Regarding the records being withheld, 21 pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including a casehandling log, a draft document, and internal communications.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing

process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, see, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep’t of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney’s opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel’s staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

Other investigatory records are being withheld in their entirety and/or partially redacted under FOIA Exemptions 6, 7(C), and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in “personnel and medical and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The “files” requirement covers all information that “applies to a particular individual.” *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). “‘Similar files’ has been interpreted broadly to include ‘[g]overnment records on an individual which can be identified as applying to that individual.’” *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, \*8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, \*3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6,).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs*

*Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The records are exempt from disclosure under the above balancing test, and are, thus, being withheld. The withheld records are investigative files created or obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals' names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. The public's interest in disclosure depends on "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest." No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, the records are protected from disclosure under Exemptions 6 and 7(C).

In addition to Exemptions 6 and 7(C), these records are withheld under Exemption 7(D). They contain information provided to the Agency under an express promise of confidentiality, and, accordingly, are exempt from disclosure. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity

is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has been closed. *Ortiz*, 70 F.3d at 733.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Four hours of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$148.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Stephanie Ostrowski, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at [stephanie.ostrowski@nrlb.gov](mailto:stephanie.ostrowski@nrlb.gov), as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

FOIA Public Liaison

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<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
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Sincerely,

FOIA Request NLRB-2021-001119  
August 5, 2021  
Page 8

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachment: (105 pages)



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

October 22, 2021

Re: FOIA Request NLRB-2021-001331

Dear Glen P. Doherty [Hodgson Russ LLP]:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on September 8, 2021, in which you seek *United Steelworkers, Local Union No. 3298 (ITT Goulds Pumps, LLC)*, Case No. 03-CB-277072 including “position statements (with enclosures) filed by United Steelworkers, Local 3298, email communications to the Board Agent, witness statements, non-Board affidavits, and any and all communications from [a named individual] to the Board Agent.” You agreed to assume financial responsibility for the processing of your request in the amount of \$100.00.

We acknowledged your request on September 8, 2021. In a telephone conversation and an email with a member of the FOIA staff on October 6, 2021, you narrowed the scope of your request to exclude exhibits attached to the Union’s position statements.

Your request is granted in part and denied in part, as explained below.

As an initial matter, to the extent your request references communications from a specifically named individual, please be advised that I have decided to neither confirm nor deny the existence of such records pursuant to Exemptions 6 & 7(C) of the FOIA. 5 U.S.C. § 552(b)(6), (7)(C). Even to acknowledge the existence of law enforcement records on an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy FOIA case law establishes that individuals named in law enforcement investigatory files, including charging parties, witnesses, investigators, informants, and suspects, have such a protectible privacy interest. *See, e.g., Davis v. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third parties mentioned in government files have a “strong” privacy interest in non-disclosure of their identities); *Schrecker v. Dep’t. of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

Given your provision of a case number, a search of the Agency’s electronic casehandling system, NxGen, has been conducted. To the extent that you seek non-Board affidavits, the search located no records. This search, however, has yielded

43 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of these records are exempt from disclosure under Exemptions 6, 7(C), and 7(D) of the FOIA (5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D)). Specifically, redactions have been made to the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and Exemption 7(D), which pertains to information the release of which “could reasonably be expected to disclose the identity of a confidential source...” where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 5, 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)).

Regarding the records being withheld, eight pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including investigative email communications by and between Regional staff containing recommendations, strategies for the handling of the case, and the Board Agent’s casehandling logs.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir.

2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, *see Judicial Watch v. U.S. Dep’t of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney’s opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; *see also Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). *See Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and her Regional staff concerning prosecutorial positions regarding the processing of this unfair labor practice case. Since they analyze legal strategies and potential outcomes in the case, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from

forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, these internal records are being withheld in their entirety.

The portion of your request seeking affidavits is denied. Affidavits obtained by the Regional Office during the investigation of a case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6) and (b)(7)(C) and (b)(7)(D).

An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). *See, e.g., Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information

provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

One hour of professional time was expended in searching for and reviewing for release the requested material. Accordingly, please remit \$37.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use [www.pay.gov](http://www.pay.gov). From the [www.pay.gov](http://www.pay.gov) home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Patrick Plummer, the Attorney-Advisor who processed your request, at 202-273-2999 or by email at [patrick.plummer@nrlb.gov](mailto:patrick.plummer@nrlb.gov), as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

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After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachment: (43 pages)